NO. 80-216

Supreme Court, U. S.
FILED
AUG 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

CHARLES KAUFMAN,

Petitioner,

vs.

STATE OF NEW JERSEY, and
JOHN J. DEGNAN, as Attorney General
of the State of New Jersey,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

THOMAS B. MADING
44 Leigh Street
Clinton, New Jersey 08809
(201) 735-4811

MICHAEL PANCER
520 "E" Street, Suite 1100
San Diego, California 92101
(714) 236-1826

ROBERT A. SEEWALD
429 Fourth Avenue, Suite 1107
Pittsburg, Pennsylvania 15219
(412) 391-4120

Attorneys for Petitioner

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

QUESTIONS PRESENTED FOR REVIEW

A. Was the warrantless search of petitioner's luggage while under the exclusive control of the police invalid necessitating the granting of petitioner's motion below to suppress evidence?

B. Should the *Chadwick-Sanders*[1] decisions be given retroactive application to all cases still pending at the time the decisions were rendered?

---

[1] United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476 (1977)
Arkansas v. Sanders, ... U.S. ..... , 99 S. Ct. 2586 (1979)

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Contents	ii
Table of Authorities Cited	iii
Caption of case	1
Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	4
Statement of the Facts	4
Reasons Why the Writ Should be Granted	6
Argument	8
A. The warrantless search of petitioner's luggage while under the exclusive control of the police was invalid necessitating the granting of petitioner's motion below to suppress evidence	8
B. The *Chadwick-Sanders* decisions should be given retroactive application to all cases still pending at the time the decisions were rendered	11
Conclusion	17

TABLE OF AUTHORITIES CITED

Cases	Page
Almeida-Sanchez v. United States, 413 U.S. 266, 93 S. Ct. 2535 (1973)	11, 12
Arkansas v. Sanders, ... U.S. ..... , 99 S. Ct. 2586 (1979)	7, 9, 10, 11, 12, 13, 15, 16, 17
Cady v. Dombrowski, 413 U.S. 433, 93 S. Ct. 2523 (1973)	9
Cardwell v. Lewis, 417 U.S. 583, 94 S. Ct. 2464 (1974)	9
Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925)	8, 9, 15
Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975 (1970)	8, 9, 15
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224 (1968)	12
Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965)	16, 17
Mapp v. Ohio, 367 U.S.643, 81 S. Ct. 1864 (1961)	16
Schleis v. United States, 433 U.S. 905, 97 S. Ct. 2968	7, 13
United States v. Berry, 560 F.2d 861 (7th Cir. 1977), vacated on other grounds, 571 F.2d 2, cert. denied, 439 U.S. 840, 99 S. Ct. 129 (1978)	10, 13
United States v. Calandrella, 605 F.2d 236 (6th Cir.)	12

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476 (1977)	2, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17
United States v. Choate, 576 F. 2d 165 (9th Cir.), cert. denied, 439 U.S. 953, 99 S. Ct. 350 (1978)	13
United States v. Ester, 442 F. Supp. 736 (S.D. N.Y. 1978)	10
United States v. Jackson, 576 F.2d 749 (8th Cir. 1978)	10
United States v. Johnson, 588 F.2d 147 (5th Cir. 1979)	10
United States v. Kaye, ... U.S. ..... , 100 S. Ct. 522 (1979)	12
United States v. MacKay, 606 F.2d 264 (9th Cir. 1979)	6, 13
United States v. Marchand, 564 F.2d 983 (2nd Cir. 1977), cert. denied, 434 U.S. 1015, 98 S. Ct. 732 (1978)	10
United States v. Montgomery, 558 F.2d 311 (5th Cir. 1977)	12
United States v. Ochs, 595 F.2d 1247 (2nd Cir. 1979)	13
United States v. Peltier, 422 U.S. 531, 95 S. Ct. 2313 (1975)	6, 11, 12
United States v. Reda, 563 F.2d 510 (2nd Cir. 1977), cert. denied, 435 U.S. 973, 98 S. Ct. 1617 (1978)	12

TABLE OF AUTHORITIES CITED

Cases (cont'd) **Page**

United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978), cert. denied, 443 U.S. 911, 99 S. Ct. 3102 (1979) 7, 13, 14, 15

United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978), cert. denied, 443 U.S. 911, 99 S. Ct. 3102 (1979) 7, 10, 13

United States v. Vallieres, 443 F. Supp. 186 (D. Conn. 1977) 10

United States Constitution

Fourth Amendment 4, 6, 7, 8, 11, 14

United States Statute

28 U.S.C. 1257(3) 4

Supreme Court Rules

Rule 21.1(b) 1

NO. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

CHARLES KAUFMAN,

Petitioner,

vs.

STATE OF NEW JERSEY, and
JOHN J. DEGNAN, as Attorney General
of the State of New Jersey,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

---

[2]Pursuant to Rule 21.1(b), counsel of record for petitioner hereby represents that the persons shown above comprise a list of all the parties to the proceeding. (Rules of Supreme Court.)

This is a petition for CHARLES KAUFMAN for a Writ of Certiorari to review the order made by the Supreme Court of the State of New Jersey, on May 28, 1980, refusing to review and reverse the decision of the Appellate Division, Superior Court of New Jersey, filed March 24, 1980, affirming the denial of petitioner's motion to suppress as evidence certain drugs found in a closed leather bag which petitioner had in his possession while riding as a passenger in a motor vehicle. The Judge of the Superior Court who presided over the motion hearing ruled that this Court's decision in *United States v. Chadwick* did not apply to the search in this case and that the police thus did not need a warrant to open private luggage taken from the automobile, even though all potential suspects had been detained and the luggage secured.

OPINIONS BELOW

To the petitioner's knowledge, neither the order of the New Jersey Supreme Court nor the opinion of the Appellate Division have been officially or unofficially reported as yet. (A copy of the opinion of the Appellate Division of the Superior Court of New Jersey is attached hereto as Appendix "A", and a copy of the order of the Supreme Court of New Jersey is attached as Appendix "B".)

JURISDICTION

1. On August 2, 1977, the Grand Jury for Hunterdon County returned an indictment charging petitioner with pos-

sessory charges and charges of intent to distribute controlled dangerous substances.

2. On September 9, 1977, petitioner filed a Notice of Motion to Suppress Evidence of the Warrantless Search. The hearing on the motion was held before the Honorable Richard Barlow, J.S.C., on July 19, 1978, who, by order entered July 27, 1978, denied the motion.

3. On October 17, 1978, petitioner pled guilty to Count Three of the indictment, which charged him with unlawful possession of Opium, Quaaludes, Cocaine and Marijuana with intent to distribute them on April 24, 1977. The plea bargain agreement was that the State would dismiss Counts One and Two, involving simple possession of the drugs, and not oppose the same bail pending appeal.

4. On December 15, 1978, petitioner was sentenced to a term of five to seven years in the New Jersey State Penitentiary. The court agreed to free petitioner on the same bail which was posted at the time of his arrest ($50,000.00).

5. A timely Notice of Appeal was filed with the Appellate Division of the New Jersey Superior Court on January 25, 1979. The appeal was argued before the Honorable Judges Samuel Allcorn and George B. Francis on February 25, 1980. On March 24, 1980, the court handed down a one-sentence per curiam opinion affirming Judge Barlow's denial of petitioner's motion to suppress evidence.

6. On April 9, 1980, petitioner filed a Notice of Petition for Certification to the Supreme Court of the State of New Jersey. The order of that court denying

the petition was filed on May 28, 1980.

7. This petition for certiorari is being filed less than 90 days from the aforesaid date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution.

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the places to be searched and the persons or things to be seized."

STATEMENT OF THE FACTS

On April 24, 1977, petitioner and an Edward Wilczenski were passengers in a chauffeur-driven limousine traveling from New York City to Easton, Pennsylvania by way of Route 22. At approximately 7:54 a.m., Officer Dennis M. Balent of the Bridgewater Township Police noted that the limousine was speeding as it passed through his radar, and he gave pursuit. Officer Balent followed the vehicle out of Bridgewater Township into Readington Township and, after three miles, pulled the vehicle off the highway. Bridgewater Township is located in Somerset

County, New Jersey, and Readington Township is located in Hunterdon County, New Jersey.

While checking the driving credentials of the chauffeur, Officer Balent noticed two passengers in the back of the vehicle. Because the passengers were dressed in blue jeans, Officer Balent decided to conduct a further investigation. Upon close observation, Officer Balent noted that Wilczenski had a clear plastic bag protruding from the pocket of his jacket. The officer ordered Wilczenski to give him the bag and, after examining it, placed Wilczenski under arrest and advised him of his constitutional rights.

Shortly after the bag was confiscated, two additional police vehicles arrived on the scene. In one vehicle was Officer Palani of the Bridgewater Police and in the other vehicle was Officer Smith of the Readington Township Police. One of these officers ordered petitioner from the vehicle. Officer Balent then entered the vehicle and, by himself, began an extensive search. He began with the front seat area of the car, checking around the seats and in the glove compartment. Nothing of an illegal or contraband nature was discovered by this effort.

Officer Balent next directed his attention to the back seat, where he observed a closed brown leather bag which he suspected contained drugs. The leather bag was opened by Officer Balent, whereupon he was confronted with three zippered areas. The middle zipper was opened, producing one brown bag. This bag was also opened, leading to another brown bag. Inside the second brown paper bag, smaller plastic bags containing alleged controlled dangerous substances were discovered.

At the time petitioner was ordered out of the vehicle,

and before the luggage was searched, he was in custody and not free to leave. Officer Balent testified that he believed the brown leather bag contained drugs because he suspected that the residue of white powder found in the plastic bag protruding from Wilczenski's jacket pocket was a controlled dangerous substance.

REASONS WHY THE WRIT SHOULD BE GRANTED

Shortly after this Court's decision in *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476 (1977), a number of the appellate courts were faced with the difficult issue of whether or not that decision should be given retroactive effect. To date, five Courts of Appeals,[3] relying upon the reasoning advanced by this Court in *United States v. Peltier*, 422 U.S. 531, 95 S. Ct. 2313 (1975), have held that *Chadwick* is not to be applied retroactively. One circuit, the Eighth, has held otherwise.

There is no question that good arguments can be advanced on both sides of the issue. The courts refusing to apply the decision retroactively have concluded that *Chadwick* represents a significant expansion of traditional Fourth Amendment protections and that the two primary rationales for the exclusionary rule–deterrent of unlawful police conduct and the "imperative of judicial integrity"–would therefore not be served by applying *Chadwick* to seizures which occurred before the decision and which law enforcement

---

[3]The Ninth Circuit Court of Appeals recently questioned the validity of its prior rulings on this issue in United States v. MacKay, 606 F.2d 264 (9th Cir. 1979).

officers, because of prior statutory, administrative and judicial interpretation, reasonably believed in good faith to be admissible. The contra-argument is that *Chadwick* presents no question of retroactivity because *Chadwick* does not represent a departure from this Court's long-standing approach to the Fourth Amendment. Rather, the argument is that the Court simply reaffirmed the long-established constitutional principle that absent some exigency requiring an immediate search of luggage, a warrant must be obtained before law enforcement officers can search that luggage, even if seized from a vehicle.

The very actions of this Court have also provided support for retroactive application. *Chadwick* was decided on June 21, 1977. The search in *Arkansas v. Sanders*, ... U.S. ..... , 99 S. Ct. 2586 (1979), took place on April 23, 1976, and *Sanders* was decided on June 27, 1979. Without any reservation, this Court applied the *Chadwick* rule to a pre-*Chadwick* search in its *Sanders* opinion. In addition, six days after *Chadwick* was decided, the Court vacated a judgment of the Court of Appeals for the Eighth Circuit involving a 1974 brief-case search and remanded for further consideration in light of *Chadwick* (*Schleis v. United States*, 433 U.S. 905, 97 S. Ct. 2968). Also, after the Eighth Circuit concluded in *Schleis* (582 F.2d 1166 (8th Cir. 1978)) that *Chadwick* should be applied retroactively, this Court denied certiorari in *United States v. Stevie*, 582 F.2d 1175 (8th Cir. 1978), *cert. denied*, 443 U.S. 911, 99 S. Ct. 3102 (1979), though the decision in *Stevie* referred to the *Schleis* decision in determining the retroactivity issue.

It is thus readily apparent that only a direct decision by this Court on this very troublesome issue will resolve the

conflict not only raging in the federal court system but also among the various state appellate courts. In the past, the Court has chosen, by failing to grant certiorari in a number of cases, to provide a definitive answer on the question of retroactivity. However, due to the present split in the circuit courts and the various state appellate courts, it would appear that the time has finally arrived for this Court to speak out on this issue. Therefore, in order to provide the necessary uniformity of justice that our system demands, it is respectfully submitted that the instant Writ of Certiorari should be granted.

ARGUMENT

A. The Warrantless Search Of Petitioner's Luggage While Under The Exclusive Control Of The Police Was Invalid Necessitating The Granting Of Petitioner's Motion Below To Suppress Evidence.

Soon after the automobile came into widespread use, this Court first announced the automobile exception to the warrant requirement of the Fourth Amendment, holding that because of its mobility, an automobile that is stopped on the highway may be searched without a warrant when police officers have probable cause to believe it contains contraband or evidence of a crime (*Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925)). The Court later extended the ruling in *Carroll* to hold that when there is justification for a warrantless search of an automobile stopped on the highway, the search is not invalid if undertaken later at the police station (*Chambers v. Maroney*, 399 U.S. 42,

90 S. Ct. 1975 (1970); see also *Cady v. Dombrowski,* 413 U.S. 433, 93 S. Ct. 2523 (1973); *Cardwell v. Lewis,* 417 U.S. 583, 94 S. Ct. 2464 (1974)).

In the recent decisions of *United States v. Chadwick,* 433 U.S. 1, 97 S. Ct. 2476 (1977), and *Arkansas v. Sanders,* ..... U.S. ..... , 99 S. Ct. 2586 (1979), the Court declined to extend, however, the ruling of *Carroll* and its progeny to allow the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police. In *Chadwick,* federal agents seized a 200-pound footlocker incident to the arrest of three men, two of whom had just placed it in the trunk of an automobile. The arrest occurred before the trunk was closed. The locked footlocker, containing marijuana, was opened by unknown means after it had been removed by the agents to the Federal Building in Boston. The agents had probable cause to believe marijuana was in the footlocker, and the question–as the government posed it–was "[w]hether a search warrant is required before federal agents may open a locked footlocker that is properly in their possession and that they have probable cause to believe contains contraband" (97 S. Ct. at 2481, n. 3). The question was answered affirmatively because, "[t]here being no exigency, it was unreasonable for the government to conduct the search without the safeguards a judicial warrant provides" (97 S. Ct. at 2483). Thus, the Court concluded that "*when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police author-*

ity" (97 S. Ct. at 2486, emphasis added).

In the just decided case of *Arkansas v. Sanders, supra,* the Court reaffirmed its ruling in *Chadwick* in holding that police officers must obtain a warrant before searching luggage taken from an automobile which was properly stopped. Again dismissing the argument that the warrantless search of luggage is proper solely because such property is taken from an automobile lawfully stopped and searched on the street, the Court applied the rule laid down in *Chadwick* that "the exigency of mobility must be assessed at the point immediately before the search . . . " (99 S. Ct. at 2593). Therefore, once police have seized the object to be searched and have it securely within their control, "the extent of its mobility is in no way affected by the place from which it was taken. Accordingly, as a general rule, there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places (*id.*, footnotes omitted).

Applying the *Chadwick-Sanders* rationale to the facts in the instant case, it is clear that no exigencies existed which made it necessary for the officers to search the entire vehicle, let alone the closed leather bag,[4] before obtaining a warrant.

---

[4]The following cases have applied Chadwick to searches other than bulky footlockers. See United States v. Johnson, 588 F.2d 147 (5th Cir. 1979) [duffel bag]; United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978), cert. denied, 443 U.S. 911, 99 S. Ct. 3102 (1979) [suitcase]; United States v. Jackson, 576 F.2d 749 (8th Cir. 1978) [attache case]; United States v. Marchand, 564 F.2d 983 (2nd Cir. 1977), cert. denied, 434 U.S. 1015, 98 S. Ct. 732 (1978) [wallet]; United States v. Berry, 560 F.2d 861 (7th Cir. 1977) [attache case], vacated on other grounds, 571 F.2d 2, cert. denied, 439 U.S. 840, 99 S. Ct. 129 (1978); United States v. Vallieres, 443 F. Supp. 186 (D. Conn. 1977) [suitcase]; United States v. Ester, 442 F. Supp. 736 (S.D. N.Y. 1978) [suitcase].

There was simply no danger that the contents of the vehicle might have disappeared if the officers had taken the time to obtain a warrant. At the time of the search of the vehicle and its contents, all subjects were being detained and were safely within police control. Further, several police officers were present and the vehicle itself was within their firm grasp. Under such circumstances, there was no reason to suspect that the car would not remain safely in police custody until it was impounded and removed to the police garage and a warrant was obtained. As stated in *Arkansas v. Sanders, supra,* at page 2594:

> "Where—as in the present case—the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected."

B. The *Chadwick-Sanders* Decision Should Be Given Retroactive Application To All Cases Still Pending At The Time The Decisions Were Rendered.

The problem of retroactive application of the exclusionary rule in a Fourth Amendment setting was squarely faced by this Court in *United States v. Peltier,* 422 U.S. 531, 95 S. Ct. 2313 (1975). In that case, the Court considered the retroactive application of the Court's decision in *Almeida-Sanchez v. United States,* 413 U.S. 266, 93 S. Ct. 2535 (1973), which had held warrantless border searches

without probable cause to be unconstitutional. The Court recognized that the search in *Peltier* was concededly illegal under *Almeida-Sanchez* but held "that the exclusionary rule should not be mechanically applied * * * because the policies underlining the rule do not justify its retroactive application to pre-*Almeida-Sanchez* searches" (422 U.S. at 534-535, 95 S. Ct. at 2316). The Court reached its decision after concluding that neither of the two major purposes of the exclusionary rule—the deterrent of unlawful police conduct and "the imperative of judicial integrity" —would be served by excluding evidence that "law enforcement officers reasonably believed in good faith" to be admissible, even if later decisions "broaden the exclusionary rule to encompass evidence seized in that manner" (*id.*, at 537, 95 S. Ct. at 2317). According to the Court, the critical question in determining if the exclusionary rule should be applied retroactively on a given set of facts is not so much whether the decision invalidating the search "constitutes a sharp break in the line of earlier authority" (*Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 499, 88 S. Ct. 2224, 2234 (1968)), but, rather, "[whether] the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment" (*id.*, at 542, 95 S. Ct. at 2320).

Relying on the above analysis, the Second, Fifth, Sixth, Seventh and Ninth Circuits have held that *Chadwick* is not to be applied retroactively. (*United States v. Reda*, 563 F.2d 510 (2nd Cir. 1977), *cert. denied*, 435 U.S. 973, 98 S. Ct. 1617 (1978); *United States v. Montgomery*, 558 F.2d 311 (5th Cir. 1977); *United States v. Calandrella*, 605

F.2d 236 (6th Cir.), *cert. denied, United States v. Kaye,* ..... U.S. ..... , 100 S. Ct. 522 (1979); *United States v. Berry,* 571 F.2d 2 (7th Cir.), *cert. denied,* 439 U.S. 840, 99 S. Ct. 129 (1978); *United States v. Choate,* 576 F.2d 165, 182, n. 20 (9th Cir.), *cert. denied,* 439 U.S. 953, 99 S. Ct. 350 (1978).) The Eighth Circuit in *United States v. Schleis,* 582 F.2d 1166, 1173-1174 (8th Cir. 1978), has held otherwise.

The principal argument for retroactive application of *Chadwick* is that this Court so held *sub silentio* when it decided *Sanders,* as the search in *Sanders* occurred prior to the decision in *Chadwick.* Without any discussion, the Court applied the *Chadwick* rule to a pre-*Chadwick* search in its *Sanders* opinion. Indeed, the Ninth Circuit, one of the circuits which had refused to apply *Chadwick* retroactively, recently questioned its previous rulings in light of the *Chadwick* rule being applied to a pre-*Chadwick* search in *Sanders.* (See *United States v. MacKay,* 606 F.2d 264, 265, n. 2 (9th Cir. 1979.))

The other arguments in support of retroactivity are this Court's order of remand in *Schleis* for further consideration in light of *Chadwick* (433 U.S. 905, 97 S. Ct. 2968), and the denial by this Court of certiorari in *United States v. Stevie,* 443 U.S. 911, 99 S. Ct. 3102 (1979). In footnote 6 of the *Schleis* opinion, the Eighth Circuit viewed the remand order as direction to apply *Chadwick* retroactively (582 F.2d at 1173, n. 6; see also *United States v. Ochs,* 595 F.2d 1247, 1255 (2nd Cir. 1979)). It is submitted that it would have been an exercise in futility for this Court to have remanded *Schleis* had it not intended *Chadwick* to apply to pre-*Chadwick* searches. The Court's denial of certiorari in *Stevie,* even though

the decision referred to the *Schleis* decision on the retroactivity issue, constitutes further evidence of the Court's intention to apply *Chadwick* retroactively.

In addition to these arguments, the Eighth Circuit, in *Schleis* concluded that *Chadwick* presented no question of retroactivity because *Chadwick* did not represent a departure from this Court's long-standing approach to the Fourth Amendment. After an analysis of prior decisions by this Court, the *Schleis* court summarized its reasoning as follows:

> "Unlike *Peltier*, this case does not present a question of retroactivity and, thus, we need not reach the question of whether or not to apply the exclusionary rule. *Cf. United States v. Martinez*, 526 F.2d 954 (5th Cir. 1976) (holding the Supreme Court's decisions on border searches in *United States v. Ortiz*, 422 U.S. 891, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975), and *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975), to be retroactive). *Chadwick* announces no new constitutional doctrine, nor does it broaden any existing exclusionary rule. All the Court did in *Chadwick* was to hold that warrantless searches of luggage absent an exigency are an invasion of a 'legitimate privacy interest' and cannot be justified under any of the long established exceptions to the Fourth Amendment warrant requirement. In so holding, the Court stressed that 'in this area we do not write on a clean slate.' *United States v. Chadwick, supra*, 433 U.S. at 9, 97 S. Ct. at 2482. While there had been no prior Supreme Court decisions explicitly establishing the

> existence of a legitimate privacy interest in luggage, the Court cites numerous decisions, including *Ex Parte Jackson*, 96 U.S. 727, 24 L. Ed. 877 (1878), and *United States v. Van Leeuwen*, 397 U.S. 249, 90 S. Ct. 1029, 25 L. Ed. 2d 282 (1970), which 'reflect the subtle constitutional principles * * * that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasion of legitimate privacy interests, and not simply those interests found inside the four walls of the home.' *Id.*, 433 U.S. at 11, 97 S. Ct. at 2483 (fn. omitted). The Supreme Court need not have applied a well-settled constitutional principle to every possible fact situation before its decisions are entitled to retroactive effect. Moreover, in *Peltier*, the challenged border search had been conducted pursuant to statutory authority and similar searches had repeatedly been upheld against constitutional attack. *Id.*, 422 U.S. at 539-541, 95 S. Ct. 2313. Such is not the case here." (582 F.2d at 1174, footnotes omitted.)

Petitioner would urge this Court to adopt the reasoning in *Schleis* when finally ruling on this very troublesome issue. In both the *Chadwick* and *Sanders* opinions, the Court did state that it was simply refusing to extend the "automobile exception," as set forth in *Carroll* and *Chambers*, to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police. Basically, the Court only reaffirmed its prior rulings

that warrantless searches of one's personal property are unreasonable even if found outside the home. These prior rulings, as indicated by the *Chadwick* Court, "reflect the settled constitutional principle, discussed earlier, that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside the four walls of the home. *Wolf v. Colarado,* 338 U.S. 25, 27, 69 S. Ct. 1359, 1361, 93 L. Ed. 1782 (1949)" (97 S. Ct. at 2483). Therefore, there being no new constitutional principle established by *Chadwick* and *Sanders*, and considering the privacy interests at stake which law enforcement officers have always known to be jealously guarded by all courts, the purposes of the exclusionary rule would *best* be served by applying the *Chadwick* and *Sanders* decisions retroactively.

In urging the Court to apply *Chadwick* and *Sanders* retroactively, petitioner does recognize the overwhelming burden such a decision would place upon the administration of justice. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it was excluded, the witnesses available at the time of the original trial would no longer be available or their memories so dimmed as to make them virtually useless for either side. Similar considerations influenced this Court not to apply the ruling in *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1864 (1961), to state court convictions which had become final before *Mapp* was decided. (*Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731 (1965).) The instant situation being very similar to that faced by

the *Linkletter* Court (six of the Courts of Appeals had conflicting views), it is suggested that this Court, to avoid a serious disruption of the administration of justice, might wish to adopt the approach taken by the *Linkletter* Court.

It is thus respectfully submitted that as the principle that a warrantless search of one's personal luggage, even if found in an automobile lawfully stopped, was invalid absent the existence of exigent circumstances even before the *Chadwick* and *Sanders* decisions, the affirmation of that principle should now be applied retroactively or, at the very least, to all cases still pending at the time the *Chadwick* and *Sanders* decisions were rendered.

CONCLUSION

For the above-mentioned reasons, petitioner CHARLES KAUFMAN respectfully requests that this Honorable Court grant the instant Petition for Writ of Certiorari to review the order of the New Jersey Supreme Court.

Respectfully submitted,

MICHAEL PANCER

THOMAS B. MADING

ROBERT A. SEEWALD

Attorneys for Petitioner

INDEX TO APPENDIXES

Appendix		Page
"A"	Opinion of the Superior Court of New Jersey, Appellate Division, decided March 24, 1980	1
"B"	Order of May 28, 1980, of Supreme Court of New Jersey, September Term 1979 ..	2

OPINION

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

Superior Court of New Jersey, Appellate Division.
A-1634-78
STATE OF NEW JERSEY, Plaintiff-Respondent,
v. CHARLES KAUFMAN, Defendant-Appellant.

Argued: February 25, 1980 - Decided: March 24, 1980

Before Judges Allcorn and Francis

On appeal from Superior Court, Law Division, Hunterdon County.

Thomas B. Mading, attorney for appellant, Robert Seewald of Pennsylvania Bar, argued the cause.

John J. Degnan, Attorney General, attorney for respondent (Mary Ann Kenny Pidgeon, Deputy Attorney General, argued the cause).

PER CURIAM

The order denying defendant's motion to suppress as evidence certain drugs found in a motor vehicle in which he was a passenger, is affirmed substantially for the reasons expressed by Judge Barlow in his oral opinion rendered on July 19, 1978.

ORDER

Supreme Court of New Jersey
September Term 1979
C-711
STATE OF NEW JERSEY, Plaintiff-Respondent,
v. CHARLES KAUFMAN, Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1634-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 28th day of May, 1980.

Stephen W. Townsend
Clerk

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on AUGUST 11, 1980, I served the within PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY (KAUFMAN vs. STATE OF NEW JERSEY) on the following named parties by depositing three copies thereof, each, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

NEIL S. COOPER, First Assistant Prosecutor
OFFICE OF COUNTY PROSECUTOR, HUNTERDON COUNTY
Eight Court Street
Flemington, New Jersey 08822

JOHN J. DEGNAN, Attorney General
State House Annex
Trenton, New Jersey 08625

WADE H. McCREE, JR.,
Solicitor General of the United States
U. S. Department of Justice
Washington, D. C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on AUGUST 11, 1980, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 Copies to United States Supreme Court, Washington, D. C. Docket fee of $200 annexed to Original Copy

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161